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Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1995

STATE OF FLORIDA,

Petitioner,

v.

HOWARD DOUGLAS JONES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL

ROBERT A. BUTTERWORTH
Attorney General

JAMES W. ROGERS
Senior Assistant Attorney General
Florida Bar No. 0325791

WILLIAM A. SPILLIAS
Assistant Attorney General
Florida Bar No. 909769

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(904) 488-0600

Counsel for Petitioner

HIP

QUESTION PRESENTED

ARE A DEFENDANT'S DUE PROCESS RIGHTS VIOLATED WHERE UNOBJECTED TO PRELIMINARY COMMENTS TO PROSPECTIVE JURORS CONCERNING REASONABLE DOUBT ARE MADE PRIOR TO THE INTRODUCTION OF ANY EVIDENCE AND ARE FOLLOWED AT THE CLOSE OF THE CASE WITH FLORIDA'S STANDARD JURY INSTRUCTIONS WHICH COMPREHENSIVELY INFORM AND REQUIRE AN ABIDING CONVICTION OF GUILT?

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PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL

OPINIONS BELOW

The opinion of the Fourth District Court of Appeal is reported as *Jones v. State*, ___ So. 2d ___, 20 Fla. L. Weekly D1908 (Fla. 4th DCA Aug. 23, 1995), *rev. denied*, ___ So. 2d ___ (Fla. Nov. 17, 1995) and is reprinted in the appendix. [A-1].[1]

JURISDICTION

Jurisdiction to consider this petition for certiorari is being invoked under 28 U.S.C. §1257. Review was denied by the Florida Supreme Court on November 17, 1995. [A-2]. Further information supporting this Court's jurisdiction is in the "Reasons For Granting The Writ" portion of this brief.

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1 The symbol "A" followed by the appropriate number represents a citation to the materials contained in the Appendix to this pleading.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V, *United States Constitution*, provides:

> No persons shall be...deprived of life, liberty, or property, without due process of law;....

Amendment VI, *United States Constitution, provides:*

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,....

Amendment XIV, *United States Constitution, provides:*

> ...nor shall any State deprive any person of life, liberty, or property without due process of law....

STATEMENT OF THE CASE

The trial judge made preliminary comments to the prospective jurors, including:

> Now, the third cardinal rule is that in order for you, the jury, to find the Defendant guilty, the State must satisfy you, the State must convince you beyond and to the exclusion of every reasonable doubt of the Defendant's guilt. And that's what's known as the standard of proof. And that's a landmark concept. That's a bedrock foundation of our American criminal jurisprudence system. And that is, any time any jury, anywhere in the United States of America, state court, federal court, no matter what the charge is, stealing a six pack of beer, rob-

bery, murder, rape, robbery, drug trafficking, arson, no matter what the charge is, if anybody — if a jury finds a Defendant guilty, that means that jury has been satisfied and convinced beyond and to the exclusion of every reasonable doubt of the Defendant's guilt.

And I will give you a more elaborate definition of what that phrase, beyond and to the exclusion of every reasonable doubt, means when I give you the legal instructions at the conclusion of the trial. But suffice it to say, it's a very heavy burden that the State's [sic] shoulders whenever it charges somebody with committing a crime in order to secure a conviction.

But even though it's a very heavy burden, the State does not, and I repeat, stress and emphasize, the State does not have to convince you to an absolute certainty of the Defendant's guilt. Nothing is absolutely certain in life. Nothing is 100 percent certain in life other than death and taxes. So the point I'm trying to make something is that you can still have a doubt at the conclusion of this trial as to the Defendant's, Howard Jones', guilt and still find him guilty so long as it's not a reasonable doubt.

A reasonable doubt simply stated is a doubt you can attach a reason to. So if at the conclusion of this trial you have a doubt as to Mr. Jones' guilt that you can attach a reason to, that's a reasonable doubt and you must find the Defendant not guilty. But if, in fact, the only kind of doubt you have at the conclusion of this trial as to Mr. Jones' guilt is a possible doubt, a speculative doubt, an imaginary doubt or a forced doubt, that's not a reasonable

> doubt and if all the elements of the crime have been proven to you, you must find the Defendant guilty.

[A-3–4].

The trial judge told prospective jurors that the first cardinal rule was that the defendant must be presumed innocent. [A-4]. The second cardinal rule is that the State has the burden of proof. [A-4]. All elements must be proved beyond and to the exclusion of every reasonable doubt. [A-5].

At the close of evidence, the trial judge gave the following standard jury instructions:

> The Defendant has entered a plea of not guilty. What this means is you must believe and presume the Defendant to be innocent. The presumption of innocence stays with the Defendant as to each material allegation in the Information through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.
>
> To overcome the Defendant's presumption of innocence, the State has the burden of proving the following two elements:
>
> Number one, that the crime with which the defendant is charged was committed, and two, the Defendant is the person who committed that crime.
>
> Remember, the Defendant himself is never required to prove anything.
>
> Whenever you hear the words "reasonable doubt," you must consider the following:

> A reasonable doubt is not a possible doubt, a speculative doubt, an imaginary doubt or a forced doubt. Such a doubt of that nature must not influence you to return a verdict of not guilty if, in fact, you have an abiding conviction of guilt. On the other hand, if after carefully, considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the Defendant not guilty because the doubt is reasonable.
>
> It is to the evidence introduced upon this trial and to it alone that you are to look for that proof.
>
> A reasonable doubt as to the guilt of the Defendant may arise from the evidence, lack of evidence or conflict in the evidence.
>
> The bottom line is, if you have a reasonable doubt, you should find the Defendant not guilty. If you have no reasonable doubt, you should find the Defendant guilty.

(Transcript pp. 266–268).

Appellant was convicted of robbery without a deadly weapon (Transcript p. 277). The Fourth District Court of Appeal, in a per curiam reversed opinion, reversed the conviction upon the authority of *David Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA 1995), *rev. denied*, ___ So. 2d ___ (Fla. Nov. 7, 1995), which found that the trial judge's comments regarding reasonable doubt constituted fundamental error and a denial of due process, citing *Cage v. Louisiana*, 498 U.S. 39

(1990). [A-1, 6–10]. The Florida Supreme Court declined to exercise its discretionary jurisdiction. [A-2].

REASONS FOR GRANTING THE WRIT

A DEFENDANT'S DUE PROCESS RIGHTS ARE NOT VIOLATED WHERE UNOBJECTED TO PRELIMINARY COMMENTS TO THE JURY CONCERNING REASONABLE DOUBT ARE MADE PRIOR TO THE INTRODUCTION OF ANY EVIDENCE AND ARE FOLLOWED AT THE CLOSE OF THE CASE WITH FLORIDA'S STANDARD JURY INSTRUCTIONS WHICH COMPREHENSIVELY INFORM AND REQUIRE AN ABIDING CONVICTION OF GUILT.

During the voir dire process of Respondent's trial, the trial court made the following comments relating to the State's burden of proof and the concept of reasonable doubt *without objection by Respondent:*

> Now, the third cardinal rule is that in order for you, the jury, to find the Defendant guilty, the State must satisfy you, the State must convince you beyond and to the exclusion of every reasonable doubt of the Defendant's guilt. And that's what's known as the standard of proof. And that's a landmark concept. That's a bedrock foundation of our American criminal jurisprudence system. And that is, any time any jury, anywhere in the United States of America, state court, federal court, no matter what the charge is, stealing a six pack of beer, robbery, murder, rape, robbery, drug trafficking, arson, no matter what the charge is, if anybody — if a jury finds a Defendant guilty, that

means that jury has been satisfied and convinced beyond and to the exclusion of every reasonable doubt of the Defendant's guilt.

And I will give you a more elaborate definition of what that phrase, beyond and to the exclusion of every reasonable doubt, means when I give you the legal instructions at the conclusion of the trial. But suffice it to say, it's a very heavy burden that the State's [sic] shoulders whenever it charges somebody with committing a crime in order to secure a conviction.

But even though it's a very heavy burden, the State does not, and I repeat, stress and emphasize, the State does not have to convince you to an absolute certainty of the Defendant's guilt. Nothing is absolutely certain in life. Nothing is 100 percent certain in life other than death and taxes. So the point I'm trying to make something is that you can still have a doubt at the conclusion of this trial as to the Defendant's, Howard Jones', guilt and still find him guilty so long as it's not a reasonable doubt.

A reasonable doubt simply stated is a doubt you can attach a reason to. So if at the conclusion of this trial you have a doubt as to Mr. Jones' guilt that you can attach a reason to, that's a reasonable doubt and you must find the Defendant not guilty. But if, in fact, the only kind of doubt you have at the conclusion of this trial as to Mr. Jones' guilt is a possible doubt, a speculative doubt, an imaginary doubt or a forced doubt, that's not a reasonable doubt and if all the elements of the crime have been proven to you, you must find the Defendant guilty.

[A-3–4]. Following these comments, the trial judge also informed the venire that

> [t]he fifth phase of the trial consists of the legal instructions. That's where I give you the law you apply to the evidence in this case. Any preconceived ideas that you have as to what the law is or what the law should be must be disregarded by you. The only law that you apply to the evidence in this case is the law that I give you.

(Transcript p. 29). Finally, at the close of all the evidence, the trial court gave the following standard instruction relating to reasonable doubt:

> The Defendant has entered a plea of not guilty. What this means is you must believe and presume the Defendant to be innocent. The presumption of innocence stays with the Defendant as to each material allegation in the Information through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.
>
> To overcome the Defendant's presumption of innocence, the State has the burden of proving the following two elements:
>
> Number one, that the crime with which the defendant is charged was committed, and two, the Defendant is the person who committed that crime.
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> Remember, the Defendant himself is never required to prove anything.
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> Whenever you hear the words "reasonable doubt," you must consider the following:

> A reasonable doubt is not a possible doubt, a speculative doubt, an imaginary doubt or a forced doubt. Such a doubt of that nature must not influence you to return a verdict of not guilty if, in fact, you have an abiding conviction of guilt. On the other hand, if after carefully, considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the Defendant not guilty because the doubt is reasonable.
>
> It is to the evidence introduced upon this trial and to it alone that you are to look for that proof.
>
> A reasonable doubt as to the guilt of the Defendant may arise from the evidence, lack of evidence or conflict in the evidence.
>
> The bottom line is, if you have a reasonable doubt, you should find the Defendant not guilty. If you have no reasonable doubt, you should find the Defendant guilty.

(Transcript pp. 266–268).

On appeal from Respondent's convictions for robbery without a deadly weapon, the Fourth District Court of Appeal, in a per curiam opinion, reversed the conviction upon the authority of *David Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA 1995), *rev. denied*, ___ So. 2d ___ (Fla. Nov. 7, 1995). [A-1]. In *David Jones*, the Fourth District Court of Appeal held that the trial judge's comments during voir dire (which were virtually identical to the same trial judge's comments in the instant case), though not objected to, violated the due process

clause of the United States and Florida Constitution, and thus constituted fundamental error. [A-6–10]. As a result of its holding in *David Jones*, the district court reversed Respondent's convictions and remanded for a new trial. To support such action, the district court in *David Jones* relied exclusively on this Court's decision in *Cage v. Louisiana*, 498 U.S. 39 (1990).[2]

Petitioner submits that the district court has misapplied the due process clause and this Court's holding in *Cage*. The trial judge's comments were preliminary in nature and were presented as such, they were not objected to, they were not inaccurate statements of the law, and they were followed at the close of the evidence by the standard jury instruction on reasonable doubt. Under the totality of the circumstances, the district court improperly found the comments fundamental, reversible error. Therefore, this Court should grant this petition for writ of certiorari and correct the district court's erroneous application of the due process clause.

Contrary to the district court's holding in *David Jones*, the trial judge's comments to the venire, *in toto*, were an accurate statement of the law. The district court found fault with the comments because "certitude was not required" and because they suggested that the jury may base a guilty verdict on a "probability of guilt so long as it was a remarkably strong probability." [A-8]. The reasonable doubt standard, however, does not require "absolute certainty" or "one hundred percent certainty" as the trial court stated.

In *Victor v. Nebraska*, 511 U.S. —, 114 S.Ct. 1239, 127 L. Ed. 2d 583 (1994), this Court found no error in the following instruction:

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2 Because Florida courts routinely decide such matters by construing federal law, *e.g. Esty v. State*, 642 So. 2d 1074, 1080 (Fla. 1994) (where Florida Supreme Court upheld the Florida standard jury instruction on reasonable doubt based on *Victor v. Nebraska*, ___ U.S. ___, 114 S.Ct. 1239 (1994)), this Court has jurisdiction to review this case. *See Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983).

> 'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, *to a moral certainty*, of the guilt of the accused. At the same time, *absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities* of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. *A reasonable doubt is an actual and substantial doubt* arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from *mere possibility*, from bare imagination, or from fanciful conjecture.

511 U. S. at ___, 114 S.Ct. at 1249, 127 L.Ed.2d at 598 (some emphasis added). One defendant argued that the phrase "moral certainty" was error because a dictionary defined "moral certainty" as "resting upon convincing grounds of probability." 114 S.Ct. at 1247, 127 L. Ed. 2d at 595. This Court rejected that argument:

> But the beyond a reasonable doubt standard is itself *probabilistic*. "[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened."

114 S.Ct. at 1247, 127 L.Ed.2d at 595–96 (emphasis added).

In the comments made to the venire, the trial judge balanced the "absolute certainty" comment with further explanation:

> And I will give you a more elaborate definition of what that phrase, beyond and to the exclusion of every reasonable doubt, means when I give you the legal instructions at the conclusion of the trial. But suffice it to say, it's a very heavy burden that the State's [sic] shoulders whenever it charges somebody with committing a crime in order to secure a conviction.
>
> * * *
>
> A reasonable doubt simply stated is a doubt you can attach a reason to. So if at the conclusion of this trial you have a doubt as to Mr. Jones' guilt that you can attach a reason to, that's a reasonable doubt and you must find the Defendant not guilty. But if, in fact, the only kind of doubt you have at the conclusion of this trial as to Mr. Jones' guilt is a possible doubt, a speculative doubt, an imaginary doubt or a forced doubt, that's not a reasonable doubt and if all the elements of the crime have been proven to you, you must find the Defendant guilty.

[A-3–4]. Thus, the State's burden of proof was not minimized. *See Victor*, 114 S.Ct. at 1250, 127 L.Ed.2d at 599 (finding no minimization of burden of proof where "reasonable doubt" equated with "substantial doubt" in light of "mere possibility, from bare imagination, or from fanciful conjecture" language).

In *Victor,* citing to *Estelle v. McGuire,* 502 U.S. 62 (1991), this Court again narrowly interpreted the standard of review applying *Cage* and held that "the proper inquiry is not whether the instruction 'could have' been applied in unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." 114 S.Ct. at 1243, 127 L.Ed.2d at 591 (emphasis in original). Unlike in *Victor* and *Cage,* the challenged comments in this case were made during voir dire. A jury had not yet been selected or sworn. At that point, the potential jurors had no legal duty to heed the preliminary comments. *United States v. Dilg,* 700 F.2d 620, 625 (1983). Thus, there is no reasonable likelihood that the final jurors applied these comments, as opposed to the standard instructions given at the close of the case, during their deliberations. This is especially true where, as here, the trial judge specifically informed the venire that it would be given the law to apply at the end of the case.

As promised to the venire, the trial judge gave complete, approved standard instructions on reasonable doubt and presumption of innocence at the end of the case. Those instructions included the "abiding conviction of guilt" language which this Court specifically approved in *Victor* as correctly stating the Government's burden of proof. 114 S.Ct. at 1250, 127 L.Ed.2d at 600. In fact, this Court held in *Victor* that any problems with an instruction's definition of reasonable doubt is cured when combined with the "abiding conviction of guilt" language. *Id.*

What the district court failed to acknowledge and apply in this case was the well-established law that jury instructions must be read as a whole, not viewed in artificial isolation. *Henderson v. Kibbe,* 431 U.S. 145, 152 n.10 (1977); *Victor,* 114 S.Ct. at 1243, 1247, 1248, 1251. *See also Esty v. State,* 642 So. 2d 1074 (Fla. 1994) (citing *Victor* for the proposition that Florida's standard jury instruction, taken as a whole, properly defines reasonable doubt). In fact, in another case with comments by another trial judge that are "substantially

similar" to the ones made by the trial judge in this case, the Fourth District has held:

> In addition, as in *Jones*, there were no proper balancing instructions. In both cases, the instructions were given to the venire, and the standard instructions were not given until the jury was being instructed before retiring. Without these balancing instructions the error was fundamental. Accordingly, we reverse in accordance with our prior opinion in *Jones*.

McInnis v. State, Fourth District case no. 94-2792 (Fla. 4th DCA Jan. 24, 1996). [A-11–12].

The district court's belief that the standard reasonable doubt instruction given prior to deliberations could not be considered because it was not given with the trial court's preliminary comments is without basis in the law. This would seem especially true here where the trial judge told the venire that it would instruct the jury on the law at the end of the case and that any preconceived notions of law must be disregarded. Fundamental error should not be predicated on preliminary comments which were explained more thoroughly prior to deliberations. By failing to consider the totality of the circumstances, the district court erroneously applied the due process clause to reverse Jones' conviction.[3] As a result, this court should grant this petition for writ of certiorari and correct the district court's misapplication of the law.

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3 By finding the comments fundamental error, and thus not demanding of an objection when made, the district court has potentially affected a large number of cases. The trial judge in *Jones* had been making these statements for many years. To date, this claim has been raised in at least fifteen cases. [A-17–19]. These cases include convictions for first-degree murder, vehicular homicide, and attempted first-degree murder. Prisoners have also begun raising this claim in postconviction motions. [A-17–19].

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

JAMES W. ROGERS
Senior Assistant Attorney General
Florida Bar No. 0325791

WILLIAM A. SPILLIAS
Assistant Attorney General
Florida Bar No. 909769

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL 01
Tallahassee, Florida 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

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October Term, 1995

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PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL

APPENDIX

ROBERT A. BUTTERWORTH
Attorney General

JAMES W. ROGERS
Senior Assistant Attorney General
Florida Bar No. 0325791

WILLIAM A. SPILLIAS
Assistant Attorney General
Florida Bar No. 909769

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(904) 488-0600

Counsel for Petitioner

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IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA
JULY TERM 1995

HOWARD DOUGLAS JONES,
Appellant,

v. CASE NO. 94-2267

STATE OF FLORIDA,
Appellee.

Opinion filed August 23, 1995

Appeal from the Circuit Court for Broward County; Mark A. Spieser, Judge.

Richard L. Jorandby, Public Defender, and Cherry Grant, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and William A. Spillias, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

We reverse and remand for a new trial. *See Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA 1995).

GUNTHER, C.J., FARMER and KLEIN, JJ., concur.

SUPREME COURT OF FLORIDA
FRIDAY, NOVEMBER 17, 1995

STATE OF FLORIDA,
Petitioner,

v.

HOWARD DOUGLAS JONES,
Respondent.

CASE NO. 86,359
District Court of Appeal,
4th District — No. 94-2267

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, § 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, SHAW, KOGAN, HARDING and WELLS, JJ., concur

A True Copy
Test

Sid J. White
Clerk, Supreme Court

B.H.

cc: Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. Mark A. Speiser, Judge
Mr. William A. Spillias
Ms. Cherry Grant

[excerpts from transcripts (pages 22–24)]

Now, the third cardinal rule is that in order for you, the jury, to find the Defendant guilty, the State must satisfy you, the State must convince you beyond and to the exclusion of every reasonable doubt of the Defendant's guilt. And that's what's known as the standard of proof. And that's a landmark concept. That's a bedrock foundation of our American criminal jurisprudence system. And that is, any time any jury, anywhere in the United States of America, state court, federal court, no matter what the charge is, stealing a six pack of beer, robbery, murder, rape, robbery, drug trafficking, arson, no matter what the charge is, if anybody — if a jury finds a Defendant guilty, that means that jury has been satisfied and convinced beyond and to the exclusion of every reasonable doubt of the Defendant's guilt.

And I will give you a more elaborate definition of what that phrase, beyond and to the exclusion of every reasonable doubt, means when I give you the legal instructions at the conclusion of the trial. But suffice it to say, it's a very heavy burden that the State's shoulders whenever it charges somebody with committing a crime in order to secure a conviction.

But even though it's a very heavy burden, the State does not, and I repeat, stress and emphasize, the State does not have to convince you to an absolute certainty of the Defendant's guilt. Nothing is absolutely certain in life other than death or taxes. So the point I'm trying to make something is that you can still have a doubt at the conclusion of this trial as to the Defendant's, Howard Jones', guilt and still find him guilty so long as it's not a reasonable doubt.

A reasonable doubt simply stated is a doubt you can attach a reason to. So if at the conclusion of this trial you have a doubt as to Mr. Jones' guilt that you can attach a reason to, that's a reasonable doubt and you must find the Defendant not guilty. But if, in fact, the only kind of doubt you have at the conclusion of this trial as to Mr. Jones' guilt is a possible

doubt, a speculative doubt, an imaginary doubt or a forced doubt, that's not a reasonable doubt and if all the elements of the crime have been proven to you, you must find the Defendant guilty.

[excerpts from transcripts (pages 21–22)]

Number one, at the outset of this trial, when you sit here today and view the Defendant, you must presume him to be innocent. The Defendant, Mr. Jones, through his lawyer has entered a plea of not guilty. By doing so, in effect, he has requested his day in court. Well, today is his day in court. When he walks into this courtroom he begins this trial innocent and he must be viewed and presumed by you at the outset of the trial as being innocent.

Cardinal rule number two, the State, the governmental body, which Ms. Malin represents, has the burden of proving to you the Defendant is guilty. In other words, if — The Defendant has no burden of attempting to prove to you why he's innocent. The State always has the burden of proving to you why he's guilty.

And in some communist or totalitarian societies, the opposite is the case. If we're living in a communist or totalitarian society which, by the way, the number seems to be rapidly dwindling these days, if an individual is charged with committing a crime, number one, should you ever be lucky enough to get his day in court, number two, he walks into that courtroom and begins that trial presumed guilty, and number three, he, the Defendant, has to attempt to convince the tribunal why he's innocent.

That's not the way it is in the gold old U.S.A., in all 50 states of the United States of America. If you're charged with committing a crime, you're darn right entitled to your day in court. When you walk into that courtroom you begin that trial presumed innocent and the State must attempt to prove

you guilty. You, the Defendant, never have any burden of proving yourself innocent to the jury.

[excerpts from transcripts (pages 29–30)]

A couple other points you must bear in mind. Every crime in the Florida Criminal Code has what's known as elements of proof. I'll tell you how many they are and what they are for the crime of armed robber with a deadly weapon. Say, for example, for illustration purposes only, that hypothetically armed robbery with a deadly weapon has three elements of proof. Well, in order for you to find the Defendant guilty, you must be satisfied beyond and to the exclusion of every reasonable doubt of the presence of all three elements of the crime of armed robbery with a deadly weapon.

So in other words, if the State convinces you that only one of these three elements are present, it doesn't cut the mustard, not guilty.

If the State satisfies you that two of these three elements are present, it's still not enough, not guilty.

But if you're satisfied beyond and to the exclusion of every reasonable doubt of the presence of all three elements of the crime of armed robbery with a deadly weapon, you must find the Defendant guilty.

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA
JANUARY TERM 1995

DAVID JONES,
Appellant,

v.

CASE NO. 93-3248
L.T. CASE NO. 93-6875CF10

STATE OF FLORIDA,
Appellee.

Opinion filed February 1, 1995

Appeal from the Circuit Court for Broward County; Mark A. Speiser, Judge.

Richard L. Jorandby, Public Defender, and Louis G. Carres, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee.

POLEN, J.

David Jones timely appeals his judgment and sentence, after a jury trial convicting him of attempted burglary of a conveyance and resisting an officer without violence. Jones's arrest, and subsequent conviction, arose out of a confrontation with two Fort Lauderdale police officers who, in full uniform, while patrolling in a marked police car, observed the defendant sitting on a bicycle, trying the handle of a car door. When the officers approached, Jones hit Officer Donisi in the chest, jumped off his bicycle, and ran. A chase ensued, after which Jones was apprehended with the aid of a K9 dog, and arrested. This two-point appeal arose out of the trial judge's having given, at trial, extemporaneous instructions as to

what constitutes "reasonable doubt," and his improper response to a juror's question, at the close of jury instructions, as to why they had not heard anything about the defendant's background. We reverse on both points.

The trial court gave extemporaneous instructions to the jury prior to commencement of the evidentiary portions of the proceedings. Those instructions included a segment where the "cardinal rules" were explained to the jury as to how the proceedings should be conducted on the jury's part. The third of those "cardinal rules" was that the jury should not demand proof beyond all doubt or complete certainty before finding appellant guilty. The relevant portion of the court's pretrial extemporaneous instructions were as follows:

> Now, the third cardinal rule is that in order for you the jury to find the Defendant guilty you must be satisfied, the State must convince you beyond and to the exclusion of every reasonable doubt that the Defendant is guilty.
>
> That's what is known as the standard of proof, and that's a landmark concept. That's a bedrock foundation of our American Criminal jurisprudence system. That anytime any jury anywhere in the United States of America, no matter what the charge is the State must demonstrate to they jury and satisfy to the jury beyond and to the exclusion of every reasonable doubt of the Defendant's guilt.
>
> Now, I'll give you a more elaborate definition of what that phrase and concept means. The phrase beyond and to the exclusion of every reasonable doubt means suffice it to say it's a very heavy burden that the State shoulders. Whenever charging somebody with committing a crime in order to secure conviction from the jury.

> *But even though it's a very heavy burden the State does not, I repeat, stress, emphasize, the State does not have to convince you the jury to an absolute certainty of the Defendant's guilt. You do not have to be one hundred percent certain of the Defendant's guilt in order to find the Defendant guilty.*
>
> The point I'm trying to make is you can still have a doubt as to the Defendant's guilt and still find him guilty so long as it's not a reasonable doubt. A reasonable doubt simply stated is a doubt you can attach a reason to. If you have a doubt you can attach a reason that's a reasonable doubt and you must find the Defendant not guilty. But if the only kind of doubt you have as to the Defendant's guilt is a possible doubt, a speculative doubt, an imaginary doubt, a forced doubt, that's not a reasonable doubt. And if all the elements of the crime have been proven to you then you must find the Defendant guilty (emphasis added).

In the instant case, we agree with the appellant that the indispensable reasonable doubt standard, a component of due process of law in criminal proceedings was abridged by the trial judge's statement that certitude was not required. In fact, the instruction was tantamount to telling the jury that it could base a guilty verdict on a probability of guilt as long as it was remarkably strong probability. This kind of minimization of the reasonable doubt standard violated the due process clause of the federal and state constitutions. *See Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), wherein the Supreme Court deemed unacceptable a trial court's instruction that reasonable doubt "must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof."

At bar, we find that this minimization of the reasonable doubt standard constituted fundamental error as it deprived the appellant of his defense, the reliance on the reasonable doubt standard. In arriving at this conclusion, we specifically distinguish the case at bar from the holding in *Freeman v. State,* 576 So. 2d 415, 416 (Fla. 3d DCA 1991). In *Freeman,* the court held that a complaint with the reasonable doubt instruction was not preserved and did not amount to fundamental error. The court based its conclusion (that the jury instruction did not rise to the level of fundamental error) on the balancing effect of the court's having also given extensive and proper jury instructions on reasonable doubt and presumption of innocence. *Id.* at 416.

At bar, the trial judge's instructions were accurate as far as they went. However, the difficulty arises from the lack of completeness. The failure of the trial judge to give proper balancing instructions constitutes reversible error despite the fact that the appellant did not preserve the issue. Failure to give a complete and accurate instruction is *fundamental* error, *reviewable in the complete absence of a request or objection. See Carter v. State,* 469 So.2d 194 (Fla. 2d DCA 1985).

We also agree with the appellant, pertaining to Point II of his appeal, that it was reversible error for the trial judge to have impermissibly made an extemporaneous comment in addition to the standard jury instructions. In response to a juror's inquiry as to why nothing had been presented as to the background of the defendant, in terms of prior arrests or education, the trial judge's exact comment was:

[THE COURT]: Well, that type of information doesn't come out at all unless the Defendant takes the witness stand and testifies and then you learn a little more about the Defendant. But he didn't have to testify and no one could hold it against him because he didn't testify.

In *Kelly v. State*, 486 So. 2d 578, 584 (Fla. 1986), the court cautioned against deviating from the standard jury instructions, since a trial judge "walks a fine line indeed upon deciding to depart" from them as "the risk is too great that an imprudent instruction" may jeopardize "the conscientious conduct of an otherwise entirely fair trial." In the instant case, the above-quoted response from the trial judge, in response to the jury question, appeared, however unintentionally, to link failure to testify with keeping bad evidence from the jury, something that appellant immediately objected to after the damage had been done. We hold that the trial court's subsequent efforts to rectify the negative impact were insufficient. The trial judge's subsequent "curative" instruction that there was "nothing else before you" and that they "know nothing about the defendant" merely increased the potential inference that this was due to appellant's decision not to testify. At bar, we note that the defendant did request a curative instruction. However, even in the absence of such a request, the trial judge's comments, alone, would have been sufficiently damaging to constitute reversible error. Thus, we reverse and remand for a new trial on this ground.

STONE, J., and DONNER, AMY STEELE, Associate Judge, concur.

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA
JANUARY TERM 1996

JAMES McINNIS,
Appellant,

v.

CASE NO. 94-2792
L.T. CASE NO. 93-5857CF10A

STATE OF FLORIDA,
Appellee.

Opinion filed January 24, 1996

Appeal from the Circuit Court for Broward County; Charles M. Greene, Judge.

Richard L. Jorandby, Public Defender, and Ian Seldin, AssistantPublic Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

POLEN, J.

James McInnis appeals from a final judgment and sentence convicting him of grand theft. McInnis alleges that the trial court fundamentally erred by unlawfully minimizing the "beyond a reasonable doubt" standard by instructing the venire that the state need not prove its case "to perfection or certainty." We agree and reverse.

The instruction given to the venire at bar is substantially similar to the jury instruction given in *Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA 1995), as the trial court in *Jones* also instructed the venire that the state did not have to prove the defendant's guilt to an absolute certainty. In *Jones*, this court

held that the trial court's instruction, in which it stated that certitude was not required, abridged the reasonable doubt standard, a component of due process of law in a criminal proceeding. *Id.* At 490. This court further deemed such a minimization of the reasonable doubt standard fundamental error, as it deprived the appellant of his defense, the reliance on a correct instruction on the reasonable doubt standard. This court also distinguished *Jones* from the third district's opinion in *Freeman v. State,* 576 So. 2d 415 (Fla. 3d DCA 1991).

In *Freeman,* the court held that there was no reversible error in a complained-of portion of a jury instruction on reasonable doubt. The court noted that no objection was made by the defendant to this instruction, and the giving of the instruction did not otherwise rise to the level of fundamental error, especially when considered in context with the balance of the trial court's extensive and proper jury instructions on reasonable doubt and presumption of innocence. *Id.* At 416. Conversely, this court noted in *Jones* that there were insufficient balancing instructions.

At bar, as in *Jones,* the trial court repeatedly stressed that certitude of the defendant's guilt was not required. In accordance with *Jones,* this minimization of the reasonable doubt standard was fundamental error as it deprived McInnis of his defense (reliance on this standard). In addition, as in *Jones,* there were no proper balancing instructions. In both cases, the instructions were given to the venire, and the standard instructions were not given until the jury was being instructed before retiring. Without these balancing instructions, the error was fundamental. Accordingly, we reverse in accordance with our prior opinion in *Jones.*

KLEIN and PARIENTE, JJ., concur.

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF
FLORIDA

JAMES McINNIS,
Appellant,

v. Case No: 94-2792

STATE OF FLORIDA,
Appellee.

MOTION FOR REHEARING AND REHEARING EN BANC AND MOTION FOR CERTIFICATION OF CONFLICT AND CERTIFICATION OF QUESTIONS

Appellee, the State of Florida, by and through undersigned counsel, moves this Honorable Court for rehearing and rehearing en banc in the above styled cause, on the following grounds:

I. REHEARING AND REHEARING EN BANC

1. In its opinion in this case, this Court stated:

> In addition, as in *Jones*[1], there were no proper balancing instructions. In both cases, the instructions were given to the venire, and *the standard instructions were not given until the jury was being instructed before retiring*. Without these balancing instructions, the error was fundamental.

McInnis v. State, Case No. 94-2792, Slip Op. at 3 (emphasis supplied). However, *contrary* to this Court's finding, the standard instruction on reasonable doubt *was* given to the

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1 *Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA 1995), *rev. denied*, ___ So. 2d ___ (Fla. Nov. 7, 1995).

venire during the trial court's preliminary comments. See: (R 68–69); Appellee's Answer Brief at 2, 6, 12–13. Appellee submits this Court's opinion incorrectly states this fact and must be reheard.

2. As the standard instruction on reasonable doubt *was* given to the venire in this case, as well as repeated admonitions that the State was required to prove the charges beyond and to the exclusion of a reasonable doubt and that no lesser burden would suffice (R 67, 68, 70), the instant case is distinguishable from, and thus not controlled by, the decision in *Jones*. Here, as in *Freeman v. State*, 576 So. 2d 415 (Fla. 3rd DCA 1991), proper balancing instructions *were* given, both at the preliminary and final stages of the trial, thus neither reversible nor fundamental error occurred. The instant decision must be reheard and Appellant's conviction affirmed.

3. The decision in this case also conflicts with prior decisions of this Court on the issue of fundamental error. In *Farrow v. State*, 573 So. 2d 161 (Fla. 4th DCA 1990)(en banc), this Court receded from cases finding a "read back" instruction to be fundamental error. In holding that the instruction was not fundamental error this Court noted that this was a *preliminary* instruction given at the beginning of trial and that defense counsel could have immediately brought the problem to the attention of the trial court and obtained a curative instruction. This Court also found that specific and confusing substantive instructions can be held not to be fundamental. *Farrow* at 163. See also: *Webb v. State*, 519 So. 2d 748, 749 (Fla. 4th DCA 1988) (whether an instruction constitutes fundamental error depends upon its egregiousness and whether a corrective instruction would have obliterated the taint). Assuming that the 'nonstandard' preliminary comments here were somehow inartful, they were not egregious; any problem could have easily been rectified by a curative instruction and thus should not constitute fundamental error. This Court should hear this case en banc to

conform the opinion in this case to the opinions in *Farrow* and *Webb* as to the issue of fundamental error.

4. In *Jones,* this Court held that a preliminary comment to the jury regarding reasonable doubt constituted fundamental error because it indicated "absolute" or "one hundred percent" certainty was not required. Prior to the instant case the State has been arguing in the many cases affected by *Jones,* that this Court overlooked the fact that the complete, standard, approved, instruction on reasonable doubt was given prior to the jury retiring to deliberate. However, the instant case makes it clear that this Court did not overlook that fact, rather this Court found that the balancing effect of the standard instruction was insufficient because it was not given until the end of the case. Not only is this court's factual finding that the standard reasonable doubt instruction was not given until just prior to the jury retiring to deliberate incorrect, this Court's holding that it could not consider the standard, complete, approved standard jury instruction as a "balancing instruction" because it was not given until the end of the case, is directly contrary to long-established, black-letter principles of law[2]. In *Higginbotham v. State,* 19 So. 2d 829, 830 (Fla. 1944), the Court held:

> It is a recognized rule that a single instruction cannot be considered alone, but must be considered in light of *all* other instructions bearing upon the subject, and if, when so considered, the law appears to have been fairly presented to the jury, the assignment on the instruction must fail (emphasis supplied).

This basic principle of law has not changed since *Higginbotham.* See: *Austin v. State,* 40 So. 2d 896, 897 (Fla. 1949);

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2 Indeed, in *United States v. Dilg,* 700 F.2d 620, 625 (11th Cir. 1983), the court held: "The potential jurors as members of the entire venire had no sworn legal duty to heed the preliminary instructions of the court given prior to their being sworn as jurors. [Footnote omitted.] Thus there is no legal basis to assume that they did follow those instructions."

Johnson v. State, 252 So. 2d 361, 364 (Fla. 1971); *Esty v. State*, 642 So. 2d 1074, 1080 (Fla. 1994); *McCaskill v. State*, 344 So. 2d 1276, 1278 (Fla. 1977); *Moore v. State*, 308 So. 2d 563, 565 (Fla. 2d DCA 1975); *Bennett v. State*, 350 So. 2d 556, 557 (Fla. 1st DCA 1977); *Egantoff v. State*, 208 So. 2d 843, 845 (Fla. 2d DCA 1968). Moreover, this Court has repeatedly adhered to this basic principle of law. See: *Krajewski v. State*, 587 So. 2d 1175, 1180 (Fla. 4th DCA 1991); *Sloan v. Oliver*, 221 So. 2d 435 (Fla. 4th DCA 1969). This Court's failure to follow this basic tenet is especially puzzling here, as the trial judge expressly gave the standard approved instruction on reasonable doubt as part of his preliminary comments. (R 68-69). This Court stated in *Jones*, that "[a]t bar, the trial judge's instructions were accurate as far as they went." *Id.* at 491. It is extremely difficult to see how the preliminary comments in this case, which likewise were an accurate statement of the law, could be fundamental error when considered with the standard, approved jury instruction on reasonable doubt which was given as part of the preliminary comments to the venire.

5. The decision in the instant case directly conflicts with this Court's decisions in *Krawjewski* and *Sloan*, as well as with the decisions in *Higginbotham*, *Austin*, *Johnson*, *Esty*, *McCaskill*, *Moore*, *Bennett*, and *Egantoff*. This Court should recede from its decision in this case as well as its decision in *Jones*.

II. MOTION FOR CERTIFICATION

6. This claim has been raised in at least fifteen cases before this Court, including:

- *Cifuentes v. State*, Case No. 94-2059, reversed January 3, 1996
- *Frazier v. State*, Case No. 94-0600, 20 Fla. L. Weekly D2102 (Fla. 4th DCA Sept. 13, 1995), *rev. denied*, Case No. 86,543 (Fla. Dec. 19, 1995)

- *David Jones v. State,* 656 So. 2d 489 (Fla. 4th DCA 1995), *rev. denied,* Case No. 86,175 (Fla. Nov. 7, 1995)

- *Jones v. State,* Case No. 94-2267, 20 Fla. L. Weekly D1908 (Fla. 4th DCA Aug. 23, 1995), *rev. denied,* Case No. 86,359 (Fla. Nov. 17, 1995)

- *Lusskin v. State,* Case No. 95-0721

- *McInnis v. State,* Case No. 94-2792, reversed January 24, 1996

- *Pierce v. State,* Case No. 93-1302

- *Poole v. State,* Case No. 94-2731, reversed January 24, 1996

- *Rayfield v. State,* Case No. 94-0197, 20 Fla. L. Weekly D1907 (Fla. 4th DCA Aug. 23, 1995), *rev. denied,* Case No. 86,357 (Fla. Nov. 17, 1995)

- *Reyes v. State,* Case No. 95-0034

- *Variance v. State,* Case No. 94-3019, reversed (Fla. January 3, 1996)

- *Wilson v. State,* 21 Fla. L. Weekly D37, reversed Dec. 20, 1995)

- *Bove v. State,* Case No. 94-3142

- *Rodriguez v. State,* Case No. 95-0749

Preliminary comments of this type have been given for many years. Not surprisingly, this issue is also being raised in post-conviction motions. See e.g.: *Tricarico v. State,* 629 So. 2d 142 (Fla. 4th DCA 1993)(DCA Case No. 92-1935, first degree murder). Obviously, some of these cases may be difficult to retry. A great number of victims are affected by these cases. *Pierce* is a complex homicide case involving the death of a four-year-old girl and the serious injury of another child. *Lusskin* involves a conviction for solicitation to commit first

degree murder. *Bove* is a first degree murder case. *Rodriguez* is an attempted first degree murder case.

7. Due to the large number of cases involving this issue and the serious repercussions resulting from this decision, this issue is clearly one of great public importance. Moreover, this case is ideal for certification as it involves only one issue.

8. Should this Court be unwilling to recede from its opinion, Appellee asks that this Court certify the following questions as being of great public importance:

> **DOES THE GIVING OF NONSTANDARD, BUT ACCURATE, PRELIMINARY COMMENTS ON REASONABLE DOUBT, WHERE THE STANDARD INSTRUCTIONS ON REASONABLE DOUBT AND PREPONDERANCE OF EVIDENCE ARE GIVEN TO THE JURY PRIOR TO THEIR DELIBERATIONS, PRODUCE A REASONABLE LIKELIHOOD THAT THE COMMENTS AND INSTRUCTIONS WERE APPLIED IN AN UNCONSTITUTIONAL MANNER UNDER *VICTOR V. NEBRASKA*?**
>
> **IF SO, DOES THE PRELIMINARY INSTRUCTION COMBINED WITH THE OTHER INSTRUCTIONS AMOUNT TO FUNDAMENTAL ERROR REVIEWABLE WITHOUT OBJECTION?**

9. I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

10. Further, in the area of jury instructions, to be fundamental, "the error must reach down into the validity of the

trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Jackson v. State*, 307 So. 2d 232, 233 (Fla. 4th DCA 1975); *State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991). See also: *United States v. Merlos*, 8 F.3d 48 (D.C. Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1635, 128 L. Ed. 2d 358 (1994) (instruction equating reasonable doubt with "strong belief" in defendant's guilt did not constitute fundamental error); *Perez v. State*, 639 So. 2d 200 (Fla. 3rd DCA 1994) (no fundamental error shown by unobjected to reasonable doubt instruction, citing *Victor*); *Minshew v. State*, 594 So. 2d 703, 713 (Ala.Cr.App. 1991) (*Cage* claim not preserved where no objection made below). In *Esty*, the defendant objected to the standard reasonable doubt instruction on the basis that it contained terms including "possible doubt." *Id.* at 1080. The Florida Supreme Court found the issue *unpreserved* because defense counsel never requested or submitted an alternate instruction. The Court went on to hold that the standard jury instruction (the one given here both at the preliminary and final stages of the trial) was proper under *Victor*. *Id.* at 1080. See also: *Van Note v. State*, 366 So. 2d 78, 79 (Fla. 4th DCA), *cert. denied*, 376 So. 2d 76 (Fla. 1979) (improper, unnecessary and wrong preliminary *Allen* charge did not constitute fundamental error); *Sochor v. State*, 619 So. 2d 285, 290 (Fla.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 638, 126 L. Ed. 2d 596 (1993) (failing to instruct on a defense does not constitute fundamental error); *Ray v. State*, 403 So. 2d 956 (Fla. 1981) (defining fundamental error and holding that constitutional error is not necessarily fundamental error); *Bennett, supra* (failure to charge the jury as to lesser included offenses not error in absence of objection); and *McCaskill, supra* (same).

11. This Court's decision that preliminary comments to the jury which were not objected to constitute *fundamental* error conflicts with decisions in *Delva, Perez, Esty, Sochor,* and *Ray.*

12. Finally, as argued in Paragraphs 3 and 4 herein, the decision in this case conflicts with the decisions in *Higginbotham, Austin, Johnson, Esty, McCaskill, Moore, Bennett,* and *Egantoff,*

thus this Court should certify conflict between this decision and decisions of other courts of this state.

WHEREFORE, Appellee respectfully requests that this Court grant the motion for rehearing and rehearing en banc and withdraw the opinion in this case and affirm. If this Court is unwilling to do so, Appellee asks that this Court certify the questions above and certify that the decision in this case conflicts with decisions of other courts of this state.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893

OFFICE OF THE ATTORNEY GENERAL
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401
(407) 688-7759

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Motion for Rehearing and Rehearing En Banc and Motion for Certification" has been forwarded by Courier to: IAN SELDIN, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this ____day of February 1996.

_____

Of Counsel